Supreme Court, U. S.
FILED
DEC 20 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

NO. 79-964

KEN HIXSON ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

ROBERT S. BLATT
Attorney at Law
P.O. Box 1825
Fort Smith, Arkansas
Attorney for Petitioner

TREVATHAN PRINTING COMPANY, NEWPORT, ARKANSAS

INDEX

Page

PETITION 1

OPINION BELOW 2

JURISDICTION 2

UNITED STATES CONSTITUTIONAL PROVISIONS AND ARKANSAS STATUTES INVOLVED 2

QUESTIONS PRESENTED 5

STATEMENT 6

ARGUMENT 9

CONCLUSION 18

APPENDIX "A" — Opinion and Decision of Arkansas Court of Appeals A-1

APPENDIX "B" — Petition for Rehearing A-14

APPENDIX "C" — Mandate Denying Rehearing by Arkansas Court of Appeals A-16

APPENDIX "D" — Petition for Review in Arkansas Supreme Court A-17

APPENDIX "E" — Mandate of Arkansas Supreme Court Denying Review A-18

APPENDIX "F" — Notice of Filing for Writ of Certiorari for Review A-19

UNITED STATES CONSTITUTION

Sixth Amendment 3, 5

Fourteenth Amendment 3, 5

UNITED STATES STATUTES

28 U.S.C. §1257 2

ARKANSAS CONSTITUTION

Article 2, Section 16 15

ARKANSAS STATUTES

Ark. Stat. Ann. §41-1001 6
Ark. Stat. Ann. §41-2201(3) 3, 9, 12
Ark. Stat. Ann. §41-2203(1)(b) 3, 4, 6, 9, 12
Ark. Stat. Ann. §41-1901 (Repealed) 10
Ark. Stat. Ann. §41-3907 (Repealed) 10

OKLAHOMA STATUTES

21 O.S. Supp. 1978, §1541.1 11
21 O.S. Supp. 1978, §1541.2 11

CASE CITATIONS

Bakri v. State, 261 Ark. 765, 551 SW2d 215 (1977) 11

Conner v. State, 137 Ark. 123, 206 SW 747 (1918) 10

Davis v. State, 241 Ark. 646, 411 SW2d 531 (1966), Supplemental opinion on rehearing 242 Ark. 43, 411 SW2d 531 (1967) 10

Dean v. State, 258 Ark. 32, 522 SW2d 421 (1975) 11

Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed. 2d 274 (1971) 14

Giaccio v. Pennsylvania, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed. 2d 447 (1966) 13

Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066 (1937) 13

Hixson v. State, Okl. Cr., 598 P.2d 268 (1979) 12

Hollie v. State, Okl. Cr., 386 P.2d 333 (1963) 12

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970) 17

Jackson v. Virginia, —— U.S. — -, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979) 17

Kellog v. State, Okl. Cr., 551 P.2d 301 (1976) 12

Kerby v. State, 233 Ark. 8, 342 SW2d 412 (1961) 10

Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948) 16

Moser v. State, 266 Ark. 200, 583 SW2d 15 (1979) 16

Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed. 2d 110 (1972) 13

Petition of Wright, 282 F. Supp. 999 (W.D. Ark. 1968) 16

Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed. 2d 225 (1971) 15

Ross v. State, 244 Ark. 103, 424 SW2d 169 (1968) 10

Tarrance v. State of Florida, 188 U.S. 519, 23 S.Ct. 402, 47 L.Ed. 572 (1903) 15

Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940) 13

United States v. Harriss, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1954) 13

United States v. Moody, 530 F.2d 809 (8th Cir. 1976) 16

Welch v. State, Okl. Cr., 146 P.2d 141 (1944) 11

Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) 15

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

NO. ———

KEN HIXSON ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

PETITION

The Petitioner, Ken Hixson, a citizen of the State of Oklahoma, petitions this Court for a Writ of Certiorari to review the final order of the Supreme Court of Arkansas entered October 1, 1979, denying a petition to review the opinion and decision of the Arkansas Court of Appeals entered August 15, 1979, affirming the Sebastian County Circuit Court Judgment of Conviction for the offense of Theft of Property by Deception (felony) and of being a Habitual Criminal entered October 27, 1979, and submits this Petition and brief to show that the United States Supreme Court should accept this case because substantial Federal questions are involved.

OPINION BELOW

The opinion of the Arkansas Court of Appeals is reported in 266 Ark. 146, Ark. App. 587 SW2d 70 (1979). (Advance Sheets). The final order of the Arkansas Supreme Court is set forth in Appendix "E" to this Petition.

JURISDICTION

The final order of the Supreme Court of Arkansas was entered October 1, 1979, denying a petition to review the opinion and decision of the Arkansas Court of Appeals entered August 15, 1979, affirming the judgment of the Sebastian County Circuit Court sentencing Petitioner to twelve (12) years in the Department of Corrections and assessing a fine of $2,500.00 on the offense of Theft of Property by Deception (felony). Notice of filing for Writ of Certiorari to review was filed in the Arkansas Supreme Court on October 5, 1979. A motion to stay the mandate of the Arkansas Court of Appeals and the Arkansas Supreme Court and to remain on bond was filed in the Arkansas Supreme Court on September 12, 1979. On October 10, 1979, the Arkansas Supreme Court entered an order granting Petitioner's motion to stay the mandate and to remain on bond for a period not to exceed 120 days.

The jurisdiction of the United States Supreme Court to review this decision by Petition for Writ of Certiorari is conferred by 28 U.S.C. §1257.

UNITED STATES CONSTITUTIONAL PROVISIONS AND ARKANSAS STATUTES INVOLVED

The United States Constitutional Provisions involved are Amendments 6 and 14 and can be found in U.S.C.A., Constitution, Amendments 6 to 14, page 223.

Amendment 6 provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * *.

Amendment 14 provides as follows:

> * * * No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Arkansas statutes involved are *Ark. Stat. Ann.* Sections 41-2201(3) and 41-2203(1)(b) and can be found in Volume 4 at pages 252 and 256 of Arkansas Statutes Annotated, 1977 replacement (Official Edition).

Ark. Stat. Ann. §41-2201(3) provides as follows:

> 41-2201. Definitions. — As used in the Chapter (§§41-2201 — 41-2208), unless the context plainly requires otherwise:
>
> * * *
>
> (3) "Deception" means:
>
> (a) creating or reinforcing a false impression, including false impressions of fact, law, value or intention or other state of mind that the actor does not believe to be true; or
>
> (b) preventing another from acquiring information which would affect his judgment of a transaction; or

(c) failing to correct a false impression that the actor knows to be false and (i) that he created or reinforced or (ii) that he knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or

(d) failing to disclose a lien, adverse claim or other legal impediment to the enjoyment of property which the actor transfers or encumbers in consideration for the property or service obtained, or in order to continue to deprive another of his property, whether such impediment is or is not valid, or is or is not a matter of official record; or

(e) employing any other scheme to defraud.

Deception as to a person's intention to perform a promise shall not be inferred solely from the fact that he did not subsequently perform the promise. Deception does not include falsity as to matters having no pecuniary significance or puffing by statement unlikely to deceive ordinary persons in the group addressed.

Ark. Stat. Ann. §41-2203(1)(b) provides as follows:

41-2203. Theft of Property. — (1) A person commits theft of property if he:

* * *

(b) knowingly obtains the property of another person, by deception or by threat, with the purpose of depriving the owner thereof.

QUESTIONS PRESENTED

1. Was the evidence sufficient in this case to justify the jury (rational trier of fact) in finding Petitioner guilty of this offense beyond a reasonable doubt and does this Court have a duty on Petition for Writ of Certiorari to examine the evidence, as District Courts are required to do in Habeas Corpus actions, to determine if there is such evidence in order to satisfy due process of law as mandated by the Fourteenth Amendment to the United States Constitution?

2. Was Petitioner denied due process of law, equal protection of the law, privileges and immunities of a citizen in violation of the Fourteenth Amendment to the United States Constitution when he was convicted of Theft by Deception (felony) when he obtained money for a promise to perform acts in the future which he failed to fulfill?

3. Was Petitioner denied his Sixth and Fourteenth Amendment rights to due process of law and a fair trial when evidence of other alleged criminal acts of obtaining money for unfilled promises to perform acts in the future that occurred in Arkansas and Oklahoma was introduced in evidence over his objections?

STATEMENT

On October 23, 1978, Petitioner (a citizen of Oklahoma) along with Bill Bailey and Ben Nunn, was charged by amended Information with the offense of Theft by Deception (Class "B" felony) of violating *Ark. Stat. Ann.* §41-2203, in that he, between March 1, 1977, and January 5, 1978, inclusive, in Sebastian County, Arkansas, unlawfully, feloniously and knowingly obtained an aggregate sum of money in excess of $2,500.00 by deception, with the purpose of depriving the owners of their funds. Petitioner was further charged with being a Habitual Criminal in violation of *Ark. Stat. Ann.* §41-1001.

The original information charging the offense was filed on April 11, 1978. On October 11, 1978, the State, pursuant to a motion, filed a bill of particulars stating that individual members and their families of 27 churches, in Arkansas and Oklahoma, and in Sebastian County, Arkansas, Fort Smith District, in particular, had paid monies to Petitioner upon the Petitioner's representation that the churches and members would receive church directories in return for monies paid, the Petitioner knowing at the time that these representations were made that they were false and without any intent being made before or after receiving the monies to carry out those representations, the representations being made for the purpose of depriving the owners of their money.

The Court of Appeals, in its opinion, stated that the information reflected that the money was obtained from the membership of three churches in Fort Smith, of their funds by promising to deliver church directories to the churches. (The information did not.)

On October 18, 1978, the Petitioner filed a Motion in

Limine wherein he requested that the Trial Court prohibit the introduction in evidence testimony concerning monies obtained by Petitioner in this manner from several churches in Arkansas and Oklahoma outside Sebastian County, Arkansas, because the evidence was irrelevant and prejudicial. This motion was subsequently overruled and the testimony was permitted in evidence as other criminal offenses to establish a scheme or plan of the Petitioner.

Trial was held on October 24-27, 1978. The proof of the State tended to show that Petitioner entered into an agreement with a few churches in Fort Smith and their members to take pictures of the membership and in return for the sale of the pictures to the members, Petitioner would supply pictorial directories to the churches free of charge. No money was to be paid by the church. The proof further reflected that pictures were taken and delivered, money paid for the pictures, and no church directories were ever delivered as promised even though Petitioner promised to deliver the directories within 60 days after the pictures were taken.

The State also presented testimony of members of other churches in Arkansas and Oklahoma to the same effect after overruling Petitioner's Motion in Limine concerning the evidence. See footnote 4 of the opinion of the Arkansas Court of Appeals.

The Petitioner's evidence tended to show that he took the pictures, delivered them, and received money therefor from the membership. Also, the evidence reflected that he attempted to print the church directories but was unable to do so for various reasons. Further, that he had no present intention not to deliver the directories when promised, but did not deliver because of business reverses

and related matters. See the dissenting opinion of Judge Newbern of the Court of Appeals.

The Petitioner moved for a directed verdict of acquittal after the State rested (R. 584), and at the end of all the testimony (R. 842). The grounds of the motion was that the State failed to prove the elements of the offense of Theft by Deception. These motions were overruled by the Trial Court.

On October 27, 1978, the jury returned a verdict finding Petitioner guilty of the offense of Theft by Deception. The jury fixed Petitioner's punishment at twelve (12) years in the Department of Corrections and a $2,500.00 fine after determining that he was a Habitual Criminal. On the same date judgment was entered in accordance with the verdict of the jury.

Petitioner appealed the judgment to the Arkansas Supreme Court. The case was referred to the Arkansas Court of Appeals for decision. On August 15, 1979, that Court delivered its opinion and decision affirming the judgment of the Sebastian County Circuit Court.

On August 29, 1979, Petitioner petitioned the Court of Appeals for a rehearing. On September 19, 1979, that Court denied a rehearing.

On August 31, 1979, the Petitioner filed a petition for review of the decision of the Court of Appeals in the Arkansas Supreme Court. On October 1, 1979, the Supreme Court of Arkansas entered its final order denying review of of decision of the Court of Appeals.

Petitioner now petitions this Court for a Writ of Certiorari to review the final order and judgment of the Arkansas Supreme Court.

ARGUMENT

Petitioner believes that the questions presented are substantial and require plenary consideration and warrants briefs on the merits and oral argument for resolution of the questions. The questions are closely related, will be argued together, and the reasons that the questions are substantial are set out below.

1. The statutes (*Ark. Stat. Ann.* §§41-2203 and 41-2201(3)) under which Petitioner was charged and convicted are void for vagueness on their face.

2. The statutes are invalid as applied to this case because the State can be arbitrary in their enforcement in violation of due process and equal protection.

3. The statutes are an unlawful classification of conduct as a crime in the absence of a compelling State interest to promote in their application to Petitioner.

4. This unlawful and unreasonable classification of this conduct as a crime permits the jury to find a defendant guilty on evidence less than beyond a reasonable doubt in violation of due process of law.

5. The prejudicial evidence of similar conduct in Arkansas and Oklahoma compounds this due process violation.

In order to properly present this argument, it is necessary to discuss the history of the two statutes listed above and their correlation with the comparable statute in Oklahoma.

The original Theft by Deception statute in Arkansas was called False Pretenses which has been repealed. It was

Ark. Stat. Ann. §41-1901 located in Volume 4, Page 109 (1964 Replacement).

It provided as follows:

> *"Obtaining personal property by false pretense — Penalty.* — Every person, firm or corporation who with intent to defraud, cheat or avoid payment therefor, shall designedly by color of any false token or writing, or by any other written or oral false pretense, obtain a signature to any written instrument, or obtain any money, personal property, right of action, service, information or other valuable thing or effects whatever, upon conviction thereof, shall be deemed guilty of larceny, and punished accordingly. (Rev. Stat., ch. 44, div. 4, art. 11, §1; C. & M. Dig., §2449; Pope's Dig., §3073; Acts 1959, No. 111, §1, p. 323.)"

The penalty set for larceny above the value of $35.00 was conviction of a felony and punishment for one to twenty-one years in the State Penitentiary. (Ark. Stat. Ann. §41-3907). This statute has also been repealed.

Under this statute, it was well settled in Arkansas and elsewhere that the false pretense relied upon to constitute an offense under the statute must relate to a past event, or to some present existing fact, and not to something to happen in the future. *Conner v. State,* 137 Ark. 123, 206 SW 747 (1918); *Davis v. State,* 241 Ark. 646, 411 SW2d 531 (1966), supplemental opinion on rehearing, 242 Ark. 43, 411 SW2d 531 (1967); and, *Kerby v. State,* 233 Ark. 8, 342 SW 2d 412 (1961). It was clear that the misrepresentation could not relate to future actions or promises to do acts in the future even if it was accompanied by a present intention not to perform. *Ross v. State,* 244 Ark. 103, 424 SW2d 169

(1968); *Dean v. State,* 258 Ark. 32, 522 SW2d 421 (1975); *Bakri v. State,* 261 Ark. 765, 551 SW2d 215 (1977).

The corresponding Oklahoma statute is 21 O.S. Supp. 1978, §1541.1. It is as follows:

> *"Obtaining or attempting to obtain property by trick or deception — False statements or pretenses — Confidence game — Penalty.* — Every person who, with intent to cheat and defraud, shall obtain or attempt to obtain from any person, firm or corporation any money, property or valuable thing, of the value of Twenty Dollars ($20.00), or less, by means or by use of any trick or deception, or false or fraudulent representation or statement or pretense, or by any other means or instruments or device commonly called the 'confidence game,' or by means or use of any false or bogus checks, or by any other written or printed or engraved instrument or spurious coin, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed One Thousand Dollars ($1,000.00), or by imprisonment in the county jail for not more than one (1) year, or by both such fine and imprisonment. Laws 1967, c. 94, §1. Emerg. eff. April 20, 1967."

21 O.S. Supp. 1978, §1541.2 provides that if the amount obtained is in excess of $20.00, the offense is a felony punishable by one to ten years in the State Penitentiary and a fine not to exceed $5,000.00.

The offense if committed in Oklahoma requires the making of a false statement by one person to another of a past or existing fact with the intent to defraud. *Welch v. State,* Okl. Cr., 146 P.2d 141 (1944). The crime is not com-

mitted by a defendant who promises to do a future act. *Kellog v. State,* Okl. Cr., 551 P.2d 301 (1976). Also, the present Petitioner was found to not have violated this statute under the same facts as presented herein that he failed to perform a promised future act. *Hixson v. State,* Okl. Cr., 598 P.2d 268 (1979). The Court directed the churches to their civil remedies. It said, "as in *Hollie v. State,* Okl. Cr., 386 P.2d 333 (1963), any breach of the obligation incurred must be remedied by a civil suit, and the information by which the appellant was charged is demurrable on its face."

The present Arkansas Statute on the subject was passed in 1975. It is *Ark. Stat. Ann.* §41-2203(1)(b) which provides that a person commits theft of property if he knowingly obtains the property of another person, by deception with the purpose of depriving the owner thereof.

Ark. Stat. Ann. §41-2201(3)(a) defines "deception" as creating or reinforcing a false impression, including false impressions of fact, law, value, or *intention* or other state of mind that the actor does not believe to be true. (Emphasis added) The Statute further reflects, "Deception as to a person's intention to perform a promise shall not be inferred solely from the fact that he did not subsequently perform the promise. Deception does not include falsity as to matters having no pecuniary significance or puffing by statements unlikely to deceive ordinary persons in the group addressed."

It is this definition of deception concerning a promise of future acts and present intention not to perform and the proof involved that makes this statute and Petitioner's conviction unconstitutional in violation of due process of

law, equal protection of the laws and privileges and immunities.

This definition of deception containing a provision that a conviction can result if the State can prove a present intention not to perform a promise and that proof of mere failure to perform the promise will not result in a conviction makes the definition vague on its face and as applied because it can be enforced arbitrarily.

This statute is void for vagueness, both in the sense that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," *United States v. Harriss,* 347 U.S. 612, 617, 98 L.Ed 989, 996, 74 S.Ct. 808 (1954), and because it encourages arbitrary and erratic arrests and convictions. *Thornhill v. Alabama,* 310 U.S. 88, 84 L.Ed. 1093, 60 S.Ct. 736 (1940); *Herndon v. Lowry,* 301 U.S. 242, 81 L.Ed. 1066, 57 S.Ct. 732 (1937); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). Further, a statute which leaves judges and jurors free to decide, without legally fixed standards is vague. *Giaccio v. Pennsylvania,* 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

The Statute under which Petitioner was convicted is unconstitutionally vague and indefinite and does not give reasonable notice of what conduct is prohibited. What makes this definition of deception concerning present intention not to perform a promise vague? It is that this intention cannot be proved merely by the failure to perform the promise or future act. Examples are set out below.

Let's use a variation of the facts in the present case. Suppose Petitioner had delivered one directory, or five directories, or ten directories but, not all the directories as

promised, would the State have prosecuted in all three instances? or none or some?

Another example could be that a person borrows $1,000.00 from a bank and has no present intention to pay it back in the agreed ten installments when he borrowed it. Suppose he makes no payments, one payment, five payments, or nine payments. Would the State prosecute in none, some, or all these instances?

If the State does prosecute how does it prove the intention? The only way would be to show he failed to perform. This statute is ridiculous and should be struck down as a violation of due process.

The Statutes are an unlawful, arbitrary and unreasonable classification of conduct as a crime in the absence of a compelling State interest to promote in their application. Previously, present intention not to perform a future act or promise was mere civil fraud with civil remedies. These statutes make this conduct a crime even though the intent cannot be proved by mere failure to perform. Petitioner submits that there is no compelling State interest to make this a violation of the criminal law and that it can result in discrimination in enforcement.

There are many cases that announce general principles of whether or not a statute violates equal protection. *Dunn v. Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1971). It appears that to determine whether a law is violative of equal protection, the Court looks at (1) the character of the classification, (2) the individual interests asserted in support of the classification and (3) the governmental interests asserted in support of the classification. A classification must be reasonable, not arbitrary, and must rest

upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

There should not be discrimination in enforcement of the statute. If there is it violates the equal protection clause of the Fourteenth Amendment. *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Tarrance v. State of Florida,* 188 U.S. 519, 23 S.Ct. 402, 47 L.Ed. 572 (1903).

There is no rational or reasonable basis or a compelling State interest to make this conduct (present intention not to perform a promise) a crime. This is especially true when this intention cannot be proved by mere failure to perform. The complainant should be left to his civil remedies as in the past. In fact, State interest in this type of situation is nil in the light of Article 2, Section 16 of the Arkansas Constitution which prohibits imprisonment for debt. The public policy of this State shows that it has no interest in this matter because a conviction for this conduct could and would result in imprisonment for debt.

The Statute does not correct some evil or promote a legitimate State interest. For example, if the State does not have to prove an existing or past fact a person could go to the bank and borrow money, have a business reversal, and be liable to prosecution. The State could say the person committed a crime because he knew at the time he borrowed the money that he was not going to be able to pay back the money because he knew the business would fail. This type of prosecution violates the public policy of

this nation. There are Federal Bankruptcy laws that allow persons to take bankruptcy to get out from under these debts and to permit prosecution would hinder these bankruptcy laws. These statutes are vicious and arbitrary. The State could choose to prosecute some debtors and not others. The decision to prosecute can be based on discrimination factors and leaves too much to discretion as to which actor will be held criminally liable.

The use of evidence of similar acts concerning other churches in Arkansas and Oklahoma was prejudicial and denied Petitioner a fair trial and due process of law in violation of our constitution. *Michelson v. United States,* 325 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948) at 335 U.S. 475-476 cited in *Petition of Wright,* 282 F. Supp. 999 (W.D. Ark. 1968). See also *United States v. Moody,* 530 F.2d 809 (8th Cir. 1976) cited in *Moser v. State,* 266 Ark. 200, 583 SW 2d 15 (1979). The sole purpose of this evidence was not to find the Petitioner guilty of these acts but to show he was a bad character for not performing these promises in other parts of Arkansas and Oklahoma. In fact, this conduct was not a crime in Oklahoma. Also, this evidence was permitted for the sole purpose to show that he did not actually perform the promises which is not supposed to raise any inferrence under the Statute.

All of the evidence introduced in this case went to show that the Petitioner did not perform his promises. The statute provides that deception as to a person's intention to perform a promise shall not be inferred solely from the fact that he did not subsequently perform the promise. This evidence violated this statute.

This evidence permitted the jury to find the Petitioner

guilty of this offense on evidence less than beyond a reasonable doubt. This evidence permitted the jury too wide a discretion and set no fixed standards to judge guilt or innocence.

In Habeas Corpus cases the Federal District Courts are charged with the duty to examine the record to see if the evidence was sufficient to prove a Petitioner guilty of the offense beyond a reasonable doubt to a rational trier of fact. *Jackson v. Virginia,* —— U.S. ——, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), citing *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The *Jackson* case should be expanded to include cases that are brought to this Court by certiorari or by direct appeal from a state's highest court. This Court should examine on certiorari the evidence presented in this State Court conviction and reach a decision in this case on the basis of whether the evidence was sufficient to justify a rational trier of fact (jury herein) in finding guilt beyond a reasonable doubt.

For the above reasons this Court, as Federal District Courts are required to do in Habeas cases concerning State convictions, should accept this duty and determine if there is sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. Petitioner submits that it is not sufficient and he has been denied his constitutional rights to privileges and immunities, due process of law, equal protection of the law, and a fair trial.

CONCLUSION

Petitioner submits that for the above reasons the Petition for Writ of Certiorari should be granted and the case accepted for decision.

Respectfully submitted,

ROBERT S. BLATT
Attorney at Law
P.O. Box 1825
Fort Smith, Arkansas

Attorney for Petitioner

APPENDIX "A"

KEN HIXSON v. STATE OF ARKANSAS

NO. CA CR 79-14

Opinion delivered August 15, 1979

Appeal from Sebastian Circuit Court, Fort Smith District
JOHN G. HOLLAND, Judge; affirmed

DOUGLAS W. PARKER, Fort Smith, for appellant

STEVE CLARK, Atty. Gen., by DENNIS R. MOLOCK, Asst. Atty. Gen., Little Rock, for appellee

GEORGE HOWARD, JR., Judge. The central question presented for review by this appeal[1] is whether the jury's verdict finding appellant guilty of theft of property by deception is supported by substantial evidence. While a finding that there is substantial evidence requires an affirmance of appellant's conviction, a finding to the contrary dictates a reversal.

THE FACTS

On October 23, 1978, appellant was accused by information with violating Ark. Stat. Ann. §41-2203 (Repl. 1977), between March 1, 1977, and January 5, 1978, inclusive, in Sebastian County, Arkansas, Fort Smith District, of unlawfully, feloniously and knowingly obtaining an aggregate sum of money in excess of $2,500.00 by deception, with the purpose of depriving the owners, the membership

[1] This appeal was originally filed in the Arkansas Supreme Court, but was subsequently assigned to this Court under Rule 29.3 of the Rules of the Supreme Court of Arkansas.

of three churches in Fort Smith, of their funds by promising to deliver church directories to the churches.[2]

The case was tried to a jury. The jury found the appellant-defendant guilty of the charge and, after deliberating upon the charge, as well as a habitual criminal count (Ark. Stat. Ann. §41-1001) (Repl. 1977), the jury assessed appellant's confinement to the Arkansas Department of Correction for a period of 12 years and imposed a fine in the sum of $2,500.00.

Appellant asserts the following points for reversal of his conviction:

1. The evidence submitted is insufficient as a matter of law to support the verdict, and the Court erred in not directing a verdict in favor of the appellant at the close of the State's case.

2. The Court erred in denying appellant's motion in limine.

3. The Court erred in refusing to specially instruct the jury prior to permitting evidence to be presented in behalf of the State which involved acts which occurred outside Sebastian County, Arkansas.

[2] On October 11, 1978, the State, pursuant to a motion filed by appellant-defendant, filed a bill of particulars stating that individual members and their families of 27 churches, in Arkansas and Oklahoma, and in Sebastian County, Arkansas, Fort Smith District, in particular, had paid monies to appellant-defendant ". . . upon the defendant's representation that the churches and members would receive church directories in return for monies paid, the defendant knowing at the time that these representations were made that they were false and without any intent being made before or after receiving the monies to carry out those representations, the representations being made for the purpose of depriving the owners of their money."

THE DECISION

The relevant statutory provisions that appellant was accused of violating are:

"(1) A person commits theft of property if he:

(b) knowingly obtains the property of another by *deception*[3] or by threat, with the purpose of *depriving*[3] the owner thereof.

"(2) (a) Theft of property is a class B felony if:

(i) the value of the property is $2,500 or more." (Emphasis added)

We are persuaded that it was incumbent upon the State to establish the following in order to convict the appellant-defendant of the charge brought under the above provisions:

1. That appellant-defendant, at the time he received the monies from the owners, did not intend to carry out his promise to deliver church directories to the churches

[3] Deception and depriving, in relevant part, are defined in Ark. Stat. Ann. §41-2201 (Repl. 1977) as:

"(3) 'Deception' means:

(a) "creating or reinforcing a false impression, including false impressions of fact, law, value or intention or other state of mind that the actor does not believe to be true; or

. . .

(4) 'Deprive' means:

(a) "to withhold property or to cause it to be withheld either permanently or under circumstances such that a major portion of its economic value, use, or benefit is appropriated to the actor or lost to the owner; and

. . .

(c) "to dispose of property or use it or transfer any interest in it under circumstances that make its restoration unlikely."

and the membership thereof in return for the monies received by him.

2. That appellant-defendant knew, at the time he promised to deliver church directories to the churches and the membership thereof that the promise or representation was false and that the promise was made for the purpose of depriving the owners of their property.

We now turn to the record before us, which is rather voluminous, consisting of 87 exhibits and three volumes of testimony, for analysis in order to determine if the evidence presented by the State may be characterized as substantial.

Mrs. Rita Sue Rogers, Secretary of Trinity Baptist Church, Fort Smith, Arkansas, testified that on January 16, 1977, appellant entered into an agreement with Trinity Baptist Church and its members to take pictures of the membership and in return for the sale of the pictures to the members, appellant would supply pictorial directories to the church free of charge. The number of church directories to be supplied was 125% of the number of members who had their pictures taken. In other words, the church would receive at the rate of 125 directories for every 100 members who purchased portraits. No money was to be paid by the church.

The evidence clearly shows that appellant received $1,700.00 from the membership of Trinity, but the church has never received any directories, although appellant promised to deliver the directories within 60 days after the pictures were taken. The photographing of the membership was completed on April 3, 1977.

Mrs. Rogers further testified that the project created

such interest and enthusiasm among the members that a group of ladies volunteered to serve as a committee to inform the entire membership of the project and to solicit their support; that the committee scheduled the time for the individual and family sittings for the portraits; and that if shut-ins already had photographs, these photographs were to be placed in the directory for a fee of $5.00.

Mrs. Rogers also stated that appellant delivered a $500.00 personal check to the church, drawn on Sequoyah State Bank, Muldrow, Oklahoma, and made payable to Trinity Baptist Church to guarantee the delivery of the portraits to the membership; that when the pictures were not delivered, as scheduled, the check was deposited for collection, but was subsequently returned marked "account closed."

Rev. J. Elton Pennington, Pastor of Temple Baptist Church, Fort Smith, Arkansas, testified that appellant received $1,600.00 from his membership for individual and family portraits; that appellant promised to deliver directories within 90 days after the photographic work had been completed. Rev. Pennington further testified that his church would not have participated in the project if it were not for the promise made by appellant to deliver church directories at no cost to the church.

Rev. Willis Truman Moore, Pastor of East Side Baptist Church, Fort Smith, Arkansas, testified that appellant agreed to supply pictorial directories to the church in return for the purchase of individual and family portraits by the members; that 150 families were photographed and paid approximately $3,000.00 to appellant; that the church has never received any directories; that appellant offered one excuse after another when inquiries were made about

the directories and that the portraits of the membership were very poor quality.[4]

Dan Wilmoth, a representative of Photo World of Memphis, Tennessee, testified that his firm specialized in photographic processing for professional photographers; that appellant came to Memphis in April or May, 1977, to have a roll of film developed and that appellant advised

[4] This record is replete with testimony from the following named pastors and churches whose experiences with appellant parallel the experiences of Mrs. Rogers, Rev. Pennington and Rev. Moore:

(a) Rev. Don Chandler, Pastor of Wakefield Baptist Church, Little Rock, Arkansas, whose members paid between $3,000.00 and $4,000.00; and,

(b) Rev. Jerry Highfill, Pastor of Sunset Baptist Church, Ponca City, Oklahoma, whose members paid $3,090.34; and,

(c) First Christian Church, North Little Rock, Arkansas, whose members paid $2,000.00; and,

(d) Rev. Robert S. Jackson, Sr., Pastor of First Baptist Church, Poteau, Oklahoma, whose members paid approximately $2,509.23; and,

(e) Father Alan Loth, Pastor of Mother of Sorrows Church in Apache, Our Ladies in Sterling Church and St. Anna's Church in Elgin, Oklahoma, whose members paid approximately $1,-400; and,

(f) First United Methodist Church of Harrison, whose members paid $1,375.24; and,

(g) First Church of the Nazarene, North Little Rock, Arkansas, whose members paid $1,825.00; and,

(h) Rev. William R. Edwards, Pastor of Elmdale Baptist Church, Springdale, Arkansas, whose members paid $2,010.00; and,

(i) First Baptist Church, Arkoma, Oklahoma, whose members paid $1,100.00; and,

(j) Church of the Nazarene in Rogers, Arkansas, whose pastor paid $136.20, but had no knowledge of the amount of money paid by his membership; and,

(k) Church of Christ in Kingfisher, Oklahoma, whose members paid $656.35; and,

(l) Bethany Presbyterian Church of Muskogee, Oklahoma, whose members paid an undetermined amount of money; and,

(m) First Free Will Baptist Church of Ada, Oklahoma, whose members paid $2,299.00.

him that appellant was just getting started in business for himself; that appellant discussed the prospects of Photo World printing church directories for appellant's firm and that while Photo World had never printed church directories, an agreement was made with appellant whereby Photo World would print the directories for $1.50 a copy with a minimum of 200 copies; that Photo World received the necessary materials for only one church directory and that was for Bethany Presbyterian Church. However, Mr. Wilmoth testified, the directory was never printed because appellant owed Photo World $1,200.00 for work previously done in which Photo World received an insufficient fund check that had not been made good; that appellant told Photo World that appellant could not pay the $1,200.00 at that time because appellant had paid $5,000.00 on a property note. Mr. Wilmoth further testified that Photo World printed its first directory, during its 11 years of existence, in 1978.

Testifying further, Mr. Wilmoth stated that when appellant requested Photo World to commence work on the materials supplied for the one church directory, appellant was advised to "send me Three Hundred Dollars ($300.00) Cashier's Check and I'll get it printed for him"; that a day or two later, appellant called and stated, "hey, I can't get the money, you know, can you do it, please?" Wilmoth replied, "I'll tell you what, you send me One Hundred Fifty Dollars ($150.00) and I'll do it." Wilmoth testified he never heard anymore from appellant.

Dan Wilmoth also stated that the cost for printing a color 8 x 10 ranges from .75 cents to $4.50.

Don Hixson, uncle of the appellant, testified that he began working for appellant on May 15, 1977; and that he

has been a photographer most of his life and that appellant did not know anything about photography and that he, Don Hixson, endeavored to teach and help appellant in appellant's new venture; that no directories were ever delivered while he worked for appellant; that appellant paid him a salary of $250.00 per week.

Don Hixson also stated that appellant's firm is still soliciting business and holding itself out as a specialist in church directories and guaranteeing deliveries.

The record contains, as exhibits, brochures, flyers and business cards circulated by appellant containing the following declarations designed to induce churches and church members to sponsor appellant's project:

1. Pictorial Enterprise specializes in pictorial church directories with instant proofs which means only one trip to the church for the family.

2. We will put up a bond if necessary.

3. Plenty of references from other churches.

4. Portraits — living color — $24.95 value — $8.95 plus tax.

Appellant argues essentially, for the reversal of his conviction, that his promise to deliver church directories within 30 to 90 days after the termination of the photographic work was "mere puffing" and, moreover, the failure of appellant to perform a "promised future act" is not criminal.

Evidence contained in this record reveals that there were times when choirs and various auxiliaries were present at their respective churches waiting for appellant to photograph them, but appellant never appeared; and that it was necessary to reschedule the photographying.

We are not persuaded by Appellant's argument inasmuch as it is plain from the evidence in this record that appellant's conduct exceeded the conduct of a seller or a dealer in praising the virtures of something that he has to offer for sale and which is not calculated to, or is unlikely to deceive ordinary persons addressed. The evidence is crystal clear that the representations and promises made by appellant to deliver the church directories, which was an intricate part of the entire project and was the sole motivating factor that induced the churches and the membership to participate in the project, were false as a matter of fact and as to the value of the articles that the churches and members were to receive in return for delivering their monies to the appellant. Moreover, it is plain from this record that appellant had no experience or expertise either in photography or in the compilation of church directories; and that at the time that appellant made the promises to deliver the directories, appellant did not possess the facilities to print a directory, nor had he made arrangements with any other firm or source for the preparation of the directories.

The evidence establishes clearly that appellant made use of the funds received for purposes other than for what was promised by appellant.[6] Consequently, the membership of the churches involved have been deprived of the use and benefit of their property; and it seems obvious that restitution is unlikely.

Appellant further argues that the trial court erred in denying appellant's motion in limine. Here, appellant

---

[6] Aside from the testimony of Dan Wilmoth that appellant told him that appellant paid $5,000.00 on a property note, the record also discloses that funds were used to purchase a horse, to pay tractor repair bills and for other purposes.

sought to prevent the introduction of testimony concerning the total amount of money spent for photographs and directories ordered by each church. We deem it sufficient to state that the evidence of the money spent was relevant and was admissible to establish the scheme or plan of the appellant.

Appellant finally argues that the trial court committed reversible error in refusing to give cautionary or limiting instructions to the jury, prior to permitting evidence to be presented involving acts which occurred outside of Sebastian County. It is well recognized that the granting or refusal of a cautionary instruction lies within the discretion of the trial court. After carefully reviewing this record, we find no abuse of discretion on the part of the trial court in refusing to specifically instruct the jury prior to the reception of evidence involving other similar acts. *See*: Rule 404(b) of the Uniform Rules of Evidence. Moreover, the record reflects that the trial court did give a cautionary instruction to the jury prior to its deliberation as follows:

> "The Court has admitted testimony of other conduct similar to that charged in the information. You will not be permitted to convict the defendant upon such testimony. Evidence of other similar conduct, if you believe another offense has been proven, is admitted solely for the purpose of showing motive, design and particular criminal intent, habits and practices, guilty knowledge, good or bad faith, and you should consider such evidence for this purpose alone and it shall not be considered in fixing any punishment that might be imposed.
>
> "The Defendant is not on trial for any offense except the alleged offense for which he is on trial."

We conclude, after carefully reviewing the evidence in the light most favorable to appellee, as we must, *Williams v. State*, 258 Ark. 207, 523 SW2d 377 (1975), the verdict of the jury is supported by substantial evidence. Accordingly, we affirm.

NEWBERN, J., dissents.

DAVID NEWBERN, Judge, Dissenting. Appellant stands convicted of theft of property, having obtained it by deception with the purpose of depriving the owner of it. *Ark. Stat. Ann.* §41-2203(1)(b) (Repl. 1977). This alleged theft was charged as a class B felony because in the information and bill of particulars the State accused Appellant of having taken property of a value in excess of $2,500.00. See *Ark. Stat. Ann.* §41-2203(2)(a)(1) (Repl. 1977).

The evidence of the intent of the Appellant to deceive was extremely weak. The record presented a picture of a person struggling to succeed in a business he thought would make a profit. It is true he lacked experience as a photographer, and he was an abysmal failure as a businessman, but his failure is not a crime. The majority opinion refers to instances in which he pleaded with a printer to get directories printed, and the record shows a great deal of effort expended in trying to get the directories together. The "substantial evidence" to which the majority refers is really nothing more than Appellant's failure to deliver the directories. The argument seems to be that Appellant must have intended to deceive with respect to the agreements he entered to produce directories after he had failed so miserably to produce in accordance with some of his prior agreements. In quoting the statutory definition of "deception," the majority opinion leaves out the part of subsection (3)(e) of the statute which is as follows:

> "Deception as to a person's intention to perform a promise shall not be inferred solely from the fact that he did not subsequently perform the promise." *Ark. Stat. Ann.* §41-2201(3)(e) (Repl. 1977).

As pointed out in footnote 4 of the majority opinion, the record here is indeed "replete" with testimony as to other churches which had entered agreements with the Appellant. Even if that evidence was relevant to show a scheme or Appellant's intent, it was completely irrelevant to show the value of the property obtained in the theft alleged here.

I would reverse and remand this case simply because there was no showing of the value of the property obtained by this Appellant.

Assuming there was substantial evidence of deception here, however, I believe this record is devoid of evidence that the Appellant obtained property in excess of a value of $2,500.00 as a result of the offenses charged. As the majority opinion points out, the churches were to pay nothing for the directories. Those institutions were out the value of whatever their services (no pun intended) might have been worth, but there was no attempt whatever to produce evidence of the value of the efforts they expended in getting their constituent families rounded up for the photography sessions. Nor was any attempt made by the State to show the difference between the value of what the church members received (the photographs) and what they were promised (the photographs plus the "free" directories).

The argument could be made that regardless of the fact that many if not most of the church members received photographs for their money, their money — all that was

paid to Appellant for photographs and directories — was obtained by deception. The logical extension of that argument, and its fallacy, is perhaps best demonstrated by these illustrations which bear degrees of analogy:

1. X promises A a one-carat diamond in exchange for $1,000.00. A gives X $1,000.00, but X then delivers to A a chunk of glass which is completely without value and which X intended all along to deliver to A instead of a diamond.

2. X promises A a one-carat diamond in exchange for $1,000.00. A gives X $1,000.00, but X then delivers to A a diamond weighing three-quarters of a carat which X intended all along to deliver to A, knowing of the deficiency. The lesser stone is worth $750.00.

3. X promises A a one-carat diamond in exchange for $1,000.00. A gives X $1,000.00, but X then delivers to A a diamond weighing one and one-quarter carats, which X intended all along to deliver to A, knowing it to be larger than the one promised. The stone delivered is worth $1,200.00.

If no account is taken of the value received by A, then in each of these illustrations, X could be convicted of theft of property of a value in excess of $1,000.00. I simply cannot believe our statute contemplates that result in illustrations 2. and 3.

The record here shows many church members received and accepted photographs in exchange for their money. The most that can be said for certain is that Appellant took those parts of their payments which could fairly be attributed to the value of the "bonus" directories. We have no idea what that value was.

APPENDIX "B"

KEN HIXSON v. STATE OF ARKANSAS

No. CA CR 79-14

PETITION FOR REHEARING

Counsel for Appellant respectfully submits that the opinion delivered by the Court on August 15, 1979, overlooks the principle point raised on appeal in Point I and specifically that the facts in this case will not support a conviction by virtue of the fact that the acts of the defendant do not constitute a crime.

There is a total lack of evidence of monies spent by the various churches for the items which they did not receive, i.e., the directories, and certainly there is no evidence that the amount of $2,500.00 was expended for said directories which would justify the conviction of the Appellant for the offense charged.

The Appellant was tried in the State of Oklahoma under a Statute, 21 O.S. Supp. 1978, §1541.1 et al, which said Statute is not dissimilar with the Arkansas Statute under which Appellant is charged and upon appeal to the Oklahoma Supreme Court resulted in a reversal with instructions to dismiss. *Hixson v. State,* F-79-22. July 27, 1979.

In deciding the Oklahoma case, the Court quoted as in *Hollie v. State,* Okl. Cr., 386 P.2d 333 (1963):

> "any breach of the obligation incurred must be remedied by a civil suit."

It is inconceivable that the Appellant could be convicted in Arkansas on the same type of charge and with the

same set of facts which were presented to the Oklahoma Court which resulted in an affirmance of the Appellant's conviction in Arkansas and a reversal of his conviction in Oklahoma.

Counsel for Appellant respectfully submits that this Honorable Court should very carefully scrutinize this case, grant a rehearing and reconsider the decision handed down which we submit is a grevious error and a gross miscarriage of justice.

/s/ Douglas W. Parker

Filed in the Court of Appeals on August 29, 1979.

APPENDIX "C"

KEN HIXSON v. STATE OF ARKANSAS

No. CA CR 79-14

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS)
) SCT.
IN THE SUPREME COURT)

BE IT REMEMBERED, That at a session of the Court of Appeals of the State of Arkansas, begun and held in the City of Little Rock, on the 19th day of September, 1979, amongst others were the following proceedings, to-wit:

On the 19th day of September, A.D. 1979, a day of said term

KEN HIXSON, *Appellant* vs. No. CA CR-79-14 STATE OF ARKANSAS, *Appellee*	Appeal from Sebastian Circuit Court Fort Smith District

Petition of appellant for Rehearing is denied.

/s/ Jimmy H. Hawkins, Clerk

Filed in the Arkansas Court of Appeals on September 19, 1979.

APPENDIX "D"

KEN HIXSON v. STATE OF ARKANSAS

No. CA CR 79-14

PETITION FOR REVIEW

The Arkansas Court of Appeals handed down its decision on the 15th day of August, 1979, affirming the decision of the Trial Court.

That the issue in this case involves a very drastic departure from the existing Arkansas law as has been the law for years and counsel for Appellant respectfully submits that the language of the dissenting opinion handed down by the Honorable David Newbern, Judge, sets forth what the law is and what the law continues to be in the State of Arkansas.

More specifically, the Arkansas Court of Appeals overlooked subsection 3(e) of *Ark. Stats. Ann.* 41-2201 (Repl. 1977). We respectfully submit that the decision by the Arkansas Court of Appeals is grossly in error and that this Honorable Court should review this case for a decision herein.

/s/ Douglas W. Parker

Filed in Arkansas Supreme Court August 31, 1979.

APPENDIX "E"

KEN HIXSON v. STATE OF ARKANSAS

No. CA CR 79-14

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS)
) SCT.
IN THE SUPREME COURT)

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 1st day, being the First Monday on the 1st day of October, A.D. 1979, amongst others were the following proceedings, to-wit:

On the 1st day of October, A.D. 1979, a day of said term

KEN HIXSON, *Appellant* vs. No. CA CR-79-14 STATE OF ARKANSAS, *Appellee*	Appeal from Sebastian Circuit Court Fort Smith District

Petition for Review to Supreme Court is denied.

/s/ Jimmy H. Hawkins, Clerk

Filed in the Supreme Court of the State of Arkansas on October 1, 1979.

APPENDIX "F"

KEN HIXSON v. STATE OF ARKANSAS

No. CA CR 79-14

NOTICE OF FILING FOR WRIT OF CERTIORARI TO REVIEW

Comes the Appellant-Petitioner, Ken Hixson, and hereby gives notice of filing for Writ of Certiorari to review the final decision of the Arkansas Supreme Court entered on October 1, 1979, denying certiorari to review an opinion and decision delivered on August 15, 1979, by the Arkansas Court of Appeals affirming the Judgment of the Sebastian County Circuit Court, dated October 27, 1978, and designates the entire final Judgment, Opinion and Decision of the Arkansas Supreme Court and Arkansas Court of Appeals to be reviewed by Certiorari.

The review by Certiorari is taken to the United States Supreme Court under the provisions of 28 U.S.C. §1257(3).

/s/ Robert S. Blatt

Filed in the Arkansas Supreme Court on October 5, 1979.